

O P I N I O N .

THE Commissioners of Spring Garden have petitioned the Legislature to grant them authority to construct works on or adjacent to the Schuylkill, between Fairmount Dam and the Falls, for the purpose of pumping up water to supply the inhabitants of Spring Garden, and my opinion is requested by the Watering Committee on the question,—“Has the Legislature a right to make the grant asked for ?

By their charter the Schuylkill Navigation Company were authorized to make a complete slackwater navigation on the Schuylkill, by dams, locks, sluices and canals, and by the same act it is further provided that the Company shall have the privilege and be entitled to use the water power from the said river, sluices or canals,—or may sell in fee simple, lease or rent, for one or more years, the said water power, to any person or persons, to be used in such manner, and on such terms as they may think proper. *Provided*, That it be so done that it should not at any time impede or interrupt the navigation.

Under, and in pursuance of this act, the Schuylkill Navigation Company made certain contracts with the City of Philadelphia, under which the City, at her own expense, erected the Dam and Works at Fairmount, and paid all damages occasioned thereby, and the Company granted to the City in fee, the whole water power

of the river, procured by the Dam at Fairmount, and the use of the whole water of the river at Fairmount, that shall remain after drawing off what shall be necessary for the purpose of the navigation of the said river, the water, however, not to be reduced below the surface or top of the Dam. The first of these contracts, made the 3d June, 1819, recites, that the City Corporation were desirous to increase the supply of water raised from the river Schuylkill for the use of the City, and for vending the same, if they saw fit, to the adjoining districts, as well as for the other purposes therein mentioned, by means of a new and enlarged power to be obtained by the erection of a dam, &c.

The City accordingly, at great expense and risk, erected their works and made contracts (under the express authority of divers acts of Assembly passed for the purpose) with the adjoining Districts, and among the rest with the District of Spring Garden, to supply them with Schuylkill water on certain terms, mutually agreed on.

I am clearly of opinion, upon this state of the facts, that the granting the authority asked for by the District of Spring Garden would be a direct infringement of the rights of the City of Philadelphia.

I do not understand it to be denied by the Commissioners of Spring Garden, that the City is legally entitled to the whole *water power* at Fairmount, remaining after the uses of the navigation have been supplied, in other words, that the City have a right to draw off the water from the pool until it is drawn down to the top of the Dam; but they allege that the Navigation Company had no right to grant the *water itself*, and

that the City, therefore, can have no right to it. I confess I am wholly unable to understand this argument: I cannot conceive that a water power would not be destroyed by diverting all the water, or that the rights of an owner of a water power would not be infringed by diverting any part of the water. I think if the principle were applied to a common mill-dam, there are very few persons who would be found hardy enough to advocate it.

The question of the right of the City to the water of the pool above Fairmount Dam, is wholly disconnected in my opinion, with any public right. A navigable river is a highway, not a common. It is under the control of the Legislature for purposes of improvement as a highway. The rights of fishing, washing, and drinking, are merely incidental. When they are so used as to impede the navigation, the use becomes unlawful. If the Legislature authorize an improvement of the navigation, which prevents their exercise, they must give way, and no damages be recovered for their destruction. (*Shunk vs. Schuylkill Navigation Company*. 14 S. & R., 71.)

I deny utterly the right of any man, or set of men, at common law, to divert, under any pretence, or for any purpose, water from a navigable river, so as to impede, or in the slightest degree affect the navigation.

The Legislature having the right of improving the highway, may incorporate a company for this purpose; in the case of the river Schuylkill, that improvement has been made by a company under authority of law, at a vast expense of money, and with the most signal public benefit. The water power created by this improve-

ment, beyond what can be used for the navigation, is not the subject of a public right, in the sense that every inhabitant of the Commonwealth has a right to use it. It is capable of being the subject of private property, and would otherwise be useless to all. The Legislature had the right to grant it, as a compensation in part for the expense incurred in improving the navigation. They have so granted it. The City of Philadelphia holds it lawfully under that grant, and received it as the sole consideration for half a million dollars, or thereabouts, expended by her in the direct improvement of the navigation, and she holds it, it appears to me, by a tenure as sacred and inviolable as that by which any citizen holds his lands under the patent of the Commonwealth.

The fact that the City uses part of the water to which she is entitled, for the supply of her own citizens, and those of the adjoining Districts, and not directly as a mechanical power, seems to me wholly immaterial, since it could in no respect give a right to a neighbouring District to diminish the water power which the City holds.

There are many other views of the subject which occur to me, and which lead to the same result at which I have arrived, but I omit them from want of time to develope them.

W. M. MEREDITH.

March 10, 1843.

O P I N I O N .

I have examined a bill pending before the Legislature of Pennsylvania, entitled “An Act to authorize the Commissioners of Spring Garden, in the county of Philadelphia,” to construct works for supplying said district with water from the Schuylkill river; and have also considered two opinions upon the subject of the bill; one of them by Mr. Meredith, and the other by Mr. Read.

In the reasoning and result of Mr. Meredith, I concur, and am of opinion, that if the bill passes, it will infringe the rights of the City of Philadelphia, derived from a contract and grant of the Commonwealth.

The bill in question, gives authority to the Commissioners of Spring Garden, to construct steam or other suitable works on, or adjacent to the river Schuylkill, at any point between the south line of Coates street, and the northern boundary of the district, or in such other suitable location as they may deem expedient, for the purpose of pumping up water for supplying said district and the inhabitants thereof with water from said river. It consequently authorizes the commissioners, if they deem it expedient, to take water for these purposes from the pool of the Fairmount dam.

The Legislature of Pennsylvania, by the act of 8th of March, 1815, for a great and valuable consideration, and in the exercise of their undoubted right, granted to

the Schuylkill Navigation Company, the water-power from the river Schuylkill, to use it themselves, or to sell it in fee simple, or otherwise, to any person or persons, to be used in such manner, and on such terms as the Company might think proper ; provided it should not impede or interrupt the navigation ; and they also granted to the Company unlimited power to erect and set up dams and other devices whatsoever, as they might see fit ; from which these incidental advantages of water power were to be derived.

By this grant of the Commonwealth, it is not to be doubted, that the whole and entire water-power of the river, passed to the Navigation Company, and their assigns ; and that no person but the Company or its grantee, can, lawfully, use any part of this water-power, or lawfully interrupt, disturb, or impair the use of it, by the Company or its grantee, provided, the use does not impede or interrupt the navigation.

Whether the Company or its grantee does, or does not use the whole of this water-power,—whether it uses the same wastefully or otherwise,—whether the use of it, without lawful right by another, would injure the Company or its grantee, little or much, are no more questions that can be legally entertained, in regard to such an estate or interest, than in regard to any other estate or interest whatever. The use is the property. The grant of the use of the water-power, is the grant of the property in the water-power, and in the whole water-power. The Legislature, having already granted the same to the Company, and its assigns, they cannot make a second grant of any part of it to any other person, nor a grant of any other right or property which

interrupts, disturbs, or impairs the use of it by the Company or its assigns. These propositions appear, to me, to be self-evident.

What is the water-power of a river? It may be intelligibly and accurately defined by the mere transposition of the terms of the question. It is the power of the water of the river, of the whole water that customarily flows in the river; as the water-power of a dam, or at, or from a dam, is the power of the whole water that customarily flows over the dam.

In what does a water-power fundamentally consist? It consists, beyond all doubt, in the water itself; and other circumstances being equal, it is directly in proportion to the quantity of water. To take away the water altogether, is to destroy the water-power totally. To take it away in part, is so far to diminish the power. The proposition cannot be disproved by pushing it to a ridiculous extent. It is both philosophically and legally true. The Legislature have shown their own sense of its truth, by annexing to the grant of the power, the condition that it shall not be so used as to impede or interrupt the navigation. What the navigation requires may be taken from the water-power. What it does not require, belongs to the water-power.

If this were the case of the water-power of a private stream or mill-dam, the truth would be clear to the apprehension of every one. It is equally true of the water-power of the Schuylkill, all the uses of which the Legislature had a right to make the subject of exclusive grant for public purposes, and all the water-power of which it has so granted to the Company, and its assigns,

under one condition only, the maintenance of the navigation.

To divert, by a canal, any part of the water from the pool of a dam, so as not to return into the pool again, would be a clear violation of this right of water-power. To pump it up into a reservoir, and to carry it off in a number of canals or tubes, is precisely the same thing.

With the aid of these remarks, I proceed to the more immediate question of violation of the rights of the City of Philadelphia.

The Schuylkill Navigation Company, being, by their charter from the Commonwealth, invested in full property with the whole water-power of the Schuylkill, and with the power to use it, or to sell, or lease it to other persons to be used, in such manner, and upon such terms as they should see fit, subject only to the saving for the purposes of the navigation, by their contracts, agreements, or grants to and with the City of Philadelphia, especially by the instrument, dated the 14th of June, 1824, for a large and valuable consideration, granted to the City, in fee simple, the whole water and water-power of the Schuylkill, at the dam at Fairmount, without any restrictions or reservations, except such, only, as were necessary to the navigation.

That the entire water-power, at that dam, under the restrictions necessary for the navigation only, passed to the City by that grant, and is now vested in the corporation, has never, to my knowledge, been doubted, and is certainly not doubted by me. That the entire water, as the necessary and inseparable substratum or foundation of the water-power, also passed, subject only to

the same restrictions, is what I also suppose, cannot be doubted, unless a water-power may pass without a right to the water from which it is derived, or an entire water-power without a right to use all the water from which it is derived. The right to all the water passed, not merely by force of the word *water*, which is used in that grant as well as the word *water-power*, but by the necessary force of the word *water-power*, which has no existence but in the water, and cannot be entire except by the use of the whole water. No one, probably, will doubt the effect of this grant against the Navigation Company, if they should draw off water from the pool at Fairmount for any other purposes than those of the navigation; and what they cannot lawfully do, no other person can do. The word *water* is used in this grant, not as conveying more than was included in the word "*water-power*," but as expressing their assent to the manner in which it was intended to be used by the City, namely, in supplying the city and districts with water.

The City of Philadelphia, then, has acquired and now possesses the clear property, at law and equity, in the whole water-power at the Fairmount dam, and in the use of the whole water, as it customarily flows over that dam, subject to no diminution, except such as the necessities of the navigation may make. Whoever pumps up or leads off water from that pool, that is not to return into it again, violates this right of property. The purpose for which it is led off, be it for washing, drinking, or manufactures, is wholly immaterial. There are no savings of such uses in the Act incorporating the Navigation Company. There is a comprehensive

saving of the navigation; but with this exception, and this only, the grant of water-power, and with it, necessarily, the grant of its essence, the use of the water, is absolute. If this reasoning be correct, the grant of a power by the Legislature to the district of Spring Garden, to take water from this pool, for the use of the district, must impair this previous grant to the Company and its assigns, and is not in accordance with the Constitution of the United States.

The argument in favour of the bill I understand to be, that the citizens of the district, have as good a right to use the water of the Schuylkill for drinking, etc., as the citizens of the city; and that if the City can rightfully take out the water for distribution to their citizens, the Commissioners of the district may do it also, especially under a permission by the Legislature: for the City has no legislative grant for such a purpose, nor was the Navigation Company authorized to grant such a permission, if they did grant it.

The right of the City to take and distribute the water of the Schuylkill, is not involved in the present question. I do not mean to investigate it in this place. That it is thought by any one to depend upon the grant by the Schuylkill Navigation Company, can hardly be supposed, since the City did the same thing before that grant, and before the erection of the dam at Fairmount. The question on the bill, is, whether the Legislature can lawfully grant to any one the power of taking water from the pool of a dam, the whole water-power of which they have already granted to another. Whatever the original rights of the city and district in this matter, may have been, there are now two restraints upon the

exercise of any right over the waters of the river, which for great public purposes, the Legislature have rightfully imposed. The first is a restraint upon any one which interferes with the navigation, as it is improved under the charter of the Navigation Company. The second is upon any use, saving that for the navigation, that interferes with the grant of water-power..

The first binds the City and all other persons, by the general provisions of law, the grant by the Company to the City, making the right of water-power at the Fairmount dam, expressly subject to it.

The second does not operate upon the City, so far as it regards the water-power at the Fairmount dam, because she has become the purchaser of it; but it operates upon all other persons without qualification, and as to this dam even upon the Navigation Company itself, except so far as the saving for the navigation relieves the Company.

It might be conceded then, though it is not, that the city and district, before the purchase of the water-power by the City, stood on the same footing as to the use of the water of the Schuylkill for the purpose of supplying the citizens. The present difference between them is, that the City for a valuable consideration has purchased the grant of water-power from the State, or what is the same thing from the grantee of the State, and the use of the whole water, constituting the water power at Fairmount dam; and that any other person who takes the water from the said pool, violates the water-power which the Legislature granted to the Company, and the Company to the City.

The only possible reply, as it appears to me, that can be given to these remarks, is, that the use granted by the bill will not materially impair the water-power ; but this, I think, is inadmissible, either as a legal or as a conscientious reply. The whole water-power belongs to the City. Her's is the right to the full and absolute enjoyment of the grant and contract, and there can be no conscientious claim by any person, either independently or under the Commonwealth, to impair it at all. It is the same as strictly at law and in equity. The uses of property, direct and indirect, belong exclusively and entirely to him who is the exclusive owner of the property. The indirect use may consist in not permitting others to use it gratuitously at all. The prohibition leads to sales, to bargains, or contracts for the use.

A partial use, by the proprietor, may be more valuable than even such sales or bargains would be. Any unauthorized use of such a right by any body, though the direct injury be not material, may be fatal to all the indirect ones I have spoken of. I hold it to be abhorrent to every principle of law and justice, and to every suggestion of an enlightened conscience, to contend for the use of another man's right, on the ground that it will not materially injure him, or that he wastes what he has, or that he has more than he uses, or that by a discreet use after the interference, he will enjoy more than he did before. All these are suggestions in violation of property. What is mine, is mine to use or not to use,—to use partially or completely—to use parsimoniously or liberally—directly or indirectly ; and property would cease to be one's own, if the Constitution

and the principles of justice did not protect it from the least invasion, upon any such pretences. I need not say that the law rejects them all.

As the bill in question does not propose a compensation, I need say nothing on this point. The States are prohibited from passing any laws impairing the obligation of contracts, and the prohibition is unconditional, unqualified, and absolute. I repeat my concurrence in the opinion of Mr. Meredith, that the bill, if it becomes a law, will infringe the rights of the City.

H. BINNEY.

Philadelphia, March 18, 1843.

